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In the

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1998

MTK MARKETING, INC., d/b/a District Supply Center and Central Supply Center; NATIONWIDE TRANSPORT, INC., d/b/a District Supply Center, COPY RESOURCE CENTER, INC., d/b/a District Supply Center and Central Supply Center; INTEL MARKETING OF CALIFORNIA, INC., d/b/a District Supply Center; TELCO MARKETING, INC., d/b/a Central Supply Center; PARAGON SHIPPING, INC., d/b/a National Supply Center; ACACIA PROPERTIES, INC., d/b/a National Supply Center; SAM JUNE; ERICK GRAZIANO, a/k/a Eric Knight; DONALD N. RYAN; DONNA GREEN; COLLEEN MCCULLOUGH; JEANINE DORA; JAMES REM, d/b/a Central Supply Center and JR Associates,

and

FRONTIER PACIFIC INSURANCE COMPANY,
Petitioner,

-v-

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FEDERAL TRADE COMMISSION'S ANCILLARY POWERS INCLUDE THE POWER TO ENFORCE A STATE MANDATED SURETY BOND AGAINST A NON-DEFENDANT SURETY WHEN THE ANCILLARY POWERS ARISE OUT OF THE FEDERAL TRADE COMMISSIONS JUDGMENT FOR RESTITUTION AGAINST THE DEFENDANT BOND PRINCIPALS ONLY?

II. WHETHER THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDES THE FEDERAL TRADE COMMISSION FROM ENFORCING A STATE MANDATED SURETY BOND WHEN THE STATE STATUTORY SCHEME WHICH ENCOMPASSES THE SURETY BOND DOES NOT SPECIFICALLY DEFINE THE FEDERAL GOVERNMENT AS A BENEFICIARY OF THE BOND?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings before the United States Court of Appeals for the Ninth Circuit, the court whose judgment is sought to be reviewed, were the Federal Trade Commission as Plaintiff-Appellant, and Frontier Pacific Insurance Company as Respondent- Appellee. Pursuant to Rule 29.6, the parent company of Frontier Pacific Insurance Company is Frontier Insurance Company. Frontier Insurance Company is part of the Frontier Insurance Group, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is reported at *Federal Trade Commission vs. MTK Marketing, Inc., et al.*, 149 F.3d 1036 (9th Cir. 1998) (Exhibit A, p. 1a.) The Minute Order of the District Court for the Central District of California in *Federal Trade Commission vs. MTK Marketing, Inc., et al.*, Case No. SA CV - 96 - 230- LHM is Exhibit B, p. 12a.

STATEMENT OF THE BASIS OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on July 20, 1998. This petition was filed within 90 days of the judgment, and is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 53(b).
15 U.S.C. §§ 6101 et seq.
The Tenth Amendment to the United States Constitution.
California Business & Professions Code §§ 17511 et seq.

(See Exhibit C.)

STATEMENT OF THE CASE

On July 3, 1995, Petitioner Frontier Pacific Insurance Company (hereafter "Frontier Pacific") became the surety for the bond principals Erick C. Graziano, Copy Resource Center, Inc. (hereafter "CRC"), and M.T.K. Marketing, Inc. (hereafter "MTK".) (Exhibit A, p. 4a.) Frontier Pacific issued a $100,000.00 telemarketer bond (hereafter the "Bond") for the principals pursuant to the California Telephone Sellers Act (hereafter the "Act"), which can be found in California Business & Professions Code §§ 17511 et seq. (Exhibit C, p. 32a.) The bond requirement is set forth in Section 17511.12 of the Act. (Exhibit C, p. 57a.)

The Federal Trade Commission (hereafter the "FTC") initiated an action against several individual and corporate defendants, including Frontier Pacific's bond principals, seeking injunctive relief and redress for consumers under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The FTC alleged that the defendants had engaged in unfair and deceptive acts in violation of the FTC Act, 15 U.S.C. § 45. (Exhibit A, p. 4a.) Frontier Pacific was not a defendant in the FTC's action.

The FTC obtained default judgments for restitution against the corporate defendants, including Frontier Pacific's bond principals CRC and MTK (Exhibit A, p. 4a.) Thereafter, the FTC brought a motion to enforce the Bond in the district court.

Frontier Pacific opposed the motion on several grounds. The district court entered a minute order holding that because the FTC was not a "person" within the meaning of the California Act, the FTC could not enforce liability on

the Bond. (Exhibit A, p. 5a and Exhibit B, p. 12a.) The FTC appealed, and the Court of Appeals reversed and remanded the case back to the district court.

The Court of Appeals held that the FTC is a proper party to enforce liability on the bond because (1) a governmental agency can be considered a "person" under state legislation which only defines "person" as an individual or an entity, (2) the Act is to be construed liberally to achieve the goal of consumer redress, and (3) allowing the FTC to enforce the bond would not violate the Tenth Amendment because doing so would not infringe on California's sovereignty. The Court of Appeal also held that the FTC had the authority to grant ancillary relief by enforcing the Bond, even though Congress has not specifically granted the FTC the power to enforce surety bonds issued by sureties that are not defendants in FTC actions.

The basis for federal jurisdiction in the district court was derived from 28 U.S.C. § 1345. The FTC asserted that federal jurisdiction was also based upon 28 U.S.C. §§ 1331, 1337(a) and from 15 U.S.C. § 53(b).

REASONS FOR GRANTING THE WRIT

I. THE FTC'S ANCILLARY POWERS DO NOT INCLUDE THE POWER TO ENFORCE A STATE MANDATED SURETY BOND AGAINST A NON-DEFENDANT SURETY WHEN THE ANCILLARY POWERS ARISE OUT OF THE FTC'S JUDGMENT FOR RESTITUTION AGAINST THE DEFENDANT BOND PRINCIPALS ONLY.

Frontier Pacific's petition for writ of certiorari should be granted because as a result of the Court of Appeal's ruling, the FTC will be free to take actions that are in excess of its jurisdiction. "The Constitution created a Federal Government of limited powers." *New York vs. United States*, 505 U.S. 144, 155 (1992). The Court of Appeals' ruling allows the FTC to exceed the limits of Federal Governmental power.

The FTC brought an action under 15 U.S.C. § 53(b) against the defendants in the underlying case, including Frontier Pacific's bond principals CRC and MTK. The FTC's action sought injunctive relief against the defendants, and also sought ancillary relief to effectuate the eventual judgment in the form of restitution for damage to consumers resulting from the defendants' improper actions. As noted above, Frontier Pacific was not a defendant in the FTC's action.

Frontier Pacific argued in the Court of Appeals that the FTC's ancillary relief only applied against defendants in FTC actions. Since Frontier Pacific was not a defendant in the FTC action at issue, Frontier Pacific asserted that the FTC had no authority to enforce the California statutory Bond it issued.

The Court of Appeal disagreed with Frontier Pacific, and held that pursuant to FTC *vs. Patron I, Corp.*, 33 F. 3d 1088, 1102 (9th Cir. 1994), the FTC's authority "is not limited to the power to issue an injunction; rather, it includes the authority to grant any ancillary relief necessary to accomplish complete justice, including the power to order restitution." (Exhibit A, p. 10a.) The Court of Appeal determined that there was no reason why the FTC cannot be permitted to grant ancillary relief by enforcing liability on the Bond. (Exhibit, p. 10a.)

In the *Patron I, Corp.* case, the FTC sought, and was granted the power to seek restitution from a defendant in an FTC action. Nothing in the *Patron I, Corp.* case granted the FTC authority to seek ancillary relief against non-defendants. However, this is exactly what the Court of Appeals in this case has allowed. Frontier Pacific was not a defendant in the underlying action. Frontier Pacific is in this case only because, after the FTC obtained a judgment for restitution against CRC and MTK, the FTC made a motion to enforce the Bond pursuant to a California statutory scheme, the Telephone Sellers Act.

15 U.S.C. § 53(b) only gives the FTC authority to take action against "any person, partnership, or corporation" violating, or about to violate any provision of law enforced by the FTC. (Exhibit C, p. 15a.) If the enjoining of such act would be in the interest of the public, the FTC is empowered to bring suit to do so. Injunctive relief may then be granted upon a proper showing that the action would be in the public's interest, after notice to the defendant. Frontier Pacific did not violate, and was not about to violate any provision of law enforced by the FTC, and was not a defendant in the FTC action.

The language of 15 U.S.C. § 53(b), and the facts and ruling in *Patron I, Corp.*, make it clear that the FTC may only take actions, including seeking ancillary relief, against defendants named in suits filed by the FTC. "The court must be guided by the limitations Congress has placed on the exercise of specifically granted FTC powers." *Exxon Corp. vs. FTC*, 411 F. Supp. 1362, 1378 (D.Del. 1976.) "The Commission's endeavors must be limited to the exercise of powers granted by Congress." *Heater vs. FTC*, 503 F.2d 321, 327 (1974). Because Frontier Pacific was not a defendant in the underlying FTC action in this case, the FTC exceeded its authority by seeking to enforce the California statutory Bond at issue here.

Because the Court of Appeals decided an important question of law regarding FTC power, and has allowed the FTC to overstep the authority given it by Congress, this case should be heard by this Court.

II. THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDES THE FTC FROM ENFORCING A STATE MANDATED SURETY BOND WHEN THE STATE STATUTORY SCHEME WHICH ENCOMPASSES THE SURETY BOND DOES NOT SPECIFICALLY DEFINE THE FEDERAL GOVERNMENT AS A BENEFICIARY OF THE BOND.

A. The Tenth Amendment.

The Tenth Amendment to the United States Constitution states as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

States respectively, or to the people." (Exhibit C, p. 32a.)

By allowing the FTC to enforce the Bond at issue, the Court of Appeals has incorrectly allowed the Federal Government to circumvent the Tenth Amendment. (Exhibit A, pgs. 9a and 10a.) The federal government is impermissibly using an enforcement tool of the State of California as an implement of regulation. The Federal Government has its own statutory scheme for the regulation of telemarketers. The FTC should be limited to the remedies set forth in the federal scheme, instead of infringing upon the sovereignty of the State of California. See the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101, et seq. (Exhibit C, p.16a.)

In the United States Supreme Court case *New York vs. United States*, 505 U.S. 144 (1992), this Court struck down as unconstitutional one provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The "take-title" provision of the Congressional Act, which offered state governments the choice of accepting ownership of waste or passing legislation according to Congressional instructions, was found to be violative of the Tenth Amendment. *New York*, 505 U.S. at 174, 175. The Supreme Court held that:

> "Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *New York*, 505 U.S. at 175.

The Supreme Court further stated:

> "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York*, 505 U.S. at 178.

In the instant matter, the FTC was allowed by the Court of Appeals to "commandeer" the State of California into the service of the federal government's regulatory goals concerning telemarketers. This is a violation of the Tenth Amendment. If Congress believes that it has a strong federal interest in requiring telemarketers to be bonded, then Congress should issue such legislation itself. Congress did not see fit to add a surety bond requirement in its legislation regulating telemarketers. No bonding requirement can be found in 15 U.S.C. § 1601, et seq. (Exhibit C, p.16a.) The FTC cannot "conscript" the State of California as its agent, by attempting to seize the state statutory Bond at issue here.

B. The State Statute.

That the Federal Government was not intended to be a beneficiary of the Bond is evident from a plain reading of the California statute at issue. California Business & Professions Code § 17511.12(a) states, in pertinent part:

> "Every telephonic seller shall maintain a bond issued by a surety company admitted to do business in this state. The bond shall be in the amount of one hundred thousand dollars ($100,000) in favor of the State of California for the benefit of any person suffering pecuniary loss in a transaction commenced during the period of bond coverage with a telephonic

seller who violated this chapter...." (Emphasis added.) (Exhibit C, p. 57a.)

Section 17511.12(c) of the California Act states that the Bond can be enforced by the "Attorney General, district attorney, city attorney, or any other person who obtained a judgment for restitution against the seller...." (Emphasis added.) (Exhibit C, p. 59a.) The FTC is not the Attorney General of California, is not a district attorney of a California county, and is not a city attorney of a California city. The Court of Appeals held that the FTC is, however, a "person" within the meaning of the Act, so as to be able to enforce the Bond. (Exhibit A, p. 5a.) Section 17511.2(d) of the Act defines "person" as including "an individual, firm, association, corporation, partnership, joint venture, or any other business entity." (Exhibit C, p. 40a.)

By finding that the FTC is a "person" within the meaning of the California Act, the Court of Appeals has allowed the Federal Government to violate the Tenth Amendment, and improperly conscript a state government as its agent, in derogation of the powers of the State of California. Had the California legislature intended the Federal Government to be a beneficiary of the Bond at issue, the legislature would have so stated, in a plain manner, in the statute.

The Court of Appeals relied on the California Attorney General's belief that the FTC could enforce the bond to support its ruling. (Exhibit A, pgs. 7a and 8a.) This Court has held that:

> "Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified

by the 'consent' of state officials." *New York vs. United States*, 505 U.S. at 182.

The FTC's improper action in excess of its authority cannot be ratified by the California Attorney General.

The Bond at issue here is an important part of California's enforcement of its rules relating to the telemarketing business. By allowing the Federal Government to recover against the state Bond, the Court of Appeals has incorrectly allowed the Federal Government to infringe upon the reserved rights of the State of California to enforce its own laws. See *United States vs. Owens*, 100 F. 70 (1900), and *Ambrosini vs. United States*, 187 U.S. 1 (1901). Therefore, this Court should grant this petition.

CONCLUSION

This case presents a question of great importance - whether the Federal Government, even though not specifically authorized by Congress, can commandeer an enforcement tool of a state for the Federal Government's own purposes, when the Federal Government is not named as a beneficiary of the state statutory scheme. If the opinion below is allowed to stand, the idea of a Federal Government of limited powers, a concept so central to our Union, will be controverted. Accordingly, Frontier Pacific Insurance Company respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT
No. 97-55280
D.C. No. CV-96-00230-LHM
OPINION

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

MTK MARKETING, INC., d/b/a District Supply Center and Central Supply Center; NATIONWIDE TRANSPORT, INC., d/b/a District Supply Center, COPY RESOURCE CENTER, INC., d/b/a District Supply Center and Central Supply Center; INTEL MARKETING OF CALIFORNIA, INC., d/b/a District Supply Center; TELCO MARKETING, INC., d/b/a Central Supply Center; PARAGON SHIPPING, INC., d/b/a National Supply Center; ACACIA PROPERTIES, INC., d/b/a National Supply Center; SAM JUNE; ERICK GRAZIANO, a/k/a Eric Knight; DONALD N. RYAN; DONNA GREEN; COLLEEN MCCULLOUGH; JEANINE DORA; JAMES REM, d/b/a Central Supply Center and JR Associates,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted
June 5, 1998--Pasadena, California

Filed July 20, 1998

Before: Betty B. Fletcher, Dorothy W. Nelson, and Barry G. Silverman, Circuit Judges.

Opinion by Judge D.W. Nelson

COUNSEL

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Jeffrey D. Horowitz, Andrew B. Holmes, Dubois, Billig, Loughlin, Conaty & Weisman, Los Angeles, California, for the defendants-appellees.

OPINION

D.W. NELSON, Circuit Judge:

To resolve the instant appeal, we must determine whether the Federal Trade Commission ("FTC") is a "person" entitled to enforce liability on a surety bond. We conclude that it is.

FACTUAL AND PROCEDURAL BACKGROUND

This case calls upon us to interpret Article 1.4 of California's Telephone Sellers Act ("Act"), which regulates the practices of telephone solicitors. Cal. Bus. & Prof. Code §§ 17511-17511.12. The Act provides:

> It is the intent of the Legislature in enacting this article to (1) provide each prospective telephonic sales purchaser with information necessary to make an intelligent decision regarding the offer made, (2) safeguard the public against deceit and financial hardship, (3) insure, foster, and encourage competition and fair dealings among telephonic sellers by requiring adequate disclosure, and (4) prohibit representations that tend to mislead. This article shall be construed liberally in order to achieve these purposes.

§ 17511(b).

The Act requires all telephonic sellers to maintain a surety bond in the amount of $100,000 "for the benefit of any person suffering pecuniary loss in a transaction commenced during the period of bond coverage with a telephonic seller who violated" the Act. § 17511.12(a). The bond is to "include coverage for the payment of the portion of any judgment, including a judgment entered pursuant to Section 17203 or 17535, that provides for restitution to any person suffering pecuniary loss, notwithstanding whether the surety is joined or served in the action or proceeding." Id.

As telephonic sellers engaged in telemarketing in California MTK Marketing, Inc. ("MTK") and Copy Resource Center, Inc. ("CRC") were required to post a bond pursuant to section 17511.12. On November 13, 1992, Defendant Erick

Graziano purchased from the Ranger Insurance Company a $50,000 bond, which was later increased to $100,000. Frontier substituted as surety on November 14, 1994, and the bond was amended on July 3, 1995, to cover Graziano, CRC, and MTK (collectively, "bondholders").

The FTC initiated the underlying action on March 7, 1996, by filing a complaint seeking injunctive relief and redress for consumers against seven corporate defendants and eight individual defendants (collectively, "defendants"), including the bondholders. The complaint alleged that the defendants had been involved in a variety of unfair and deceptive acts and practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, in connection with efforts to sell photocopier toner to the customers of other suppliers. The FTC submitted evidence showing that defendants had defrauded consumers of millions of dollars.

On August 5, 1996, the court entered stipulated final judgments against all eight individual defendants and against one corporate defendant, Intel Marketing of California. The court granted injunctive relief, and the defendants agreed to pay consumer redress. On September 18, 1996, a default judgment was entered against the remaining six corporate defendants, who were permanently enjoined from engaging in any telemarketing activities. In addition, MTK was ordered to pay consumer redress in the amount of $1,335,093. The remaining five corporations also were required to pay redress, totaling over $13 million.

Because the FTC had obtained a judgment in the underlying action for approximately $1.8 million, and because CRC and MTK had assets amounting to less than $131,000, the FTC filed a motion to enforce liability on the bond. Frontier

opposed the FTC's motion on a variety of grounds. On December 6, 1996, the district court entered a minute order holding that, because the FTC was not a "person " under the Act, it could not enforce liability on the bond. The district court denied the FTC's motion "without prejudice to a proper party bringing a separate action in a court with proper jurisdiction." The FTC timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

STANDARD OF REVIEW

The district court's decision involves the interpretation of state law, which we review de novo. Mastro v. Witt, 39 F.3d 238, 241 (9th Cir. 1994).

DISCUSSION

I. The FTC is a proper party to enforce liability on the bond.

The Act provides that bonds may be enforced by "the Attorney General, district attorney, city attorney, or any other person who obtained a judgment for restitution against the seller . . . ." § 17511.12(c)(2). The FTC argues that the definition of "person" should be read expansively, thereby conferring standing upon the FTC to enforce liability. Based upon our review of the applicable case law, statutory language, and legislative history, we agree.

A. Case law

[1] Supreme Court precedent does not support the notion that a governmental agency can never be a "person." In United States v. Cooper Corp., 312 U.S. 600 (1941), the

Supreme Court was called upon to interpret the meaning of "person" under the Sherman Act, which defined "person" to include corporations and associations. To resolve the issue, the Court considered "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute." Id. at 605. The Court concluded that under antitrust law, a federal governmental agency could not qualify as a "person" entitled to treble damages. Id. at 606. The very next year, however, the Court applied the same analytical framework to hold that a state could constitute a "person" entitled to collect treble damages under the Sherman Act. See Georgia v. Evans, 316 U.S. 159, 162 (1942). More recently, in Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), the Court noted that the definition of "person " was "inclusive rather than exclusive," id. at 312 n.9, and concluded that the State of India was a person under the Clayton Act, id. at 313.

[2] Applying the analysis outlined in Cooper, we have held that under section 1755 of the California Unemployment Insurance Code, the postal service is a "person, " on whom the Employment Development Department could serve a notice of levy, despite the fact that section 1758 of the insurance code defines "person" to "include[ ] this State and any county, city and county, municipality, district or other political subdivision thereof." Employment Develop. Dep't. v. United States Postal Serv., 698 F.2d 1029, 1032-33 (9th Cir. 1983) (per curiam) rev'd on other grounds in Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512 (1984). We reasoned that because there was no requirement that the statute explicitly include the United States or its agencies within the definition of "person," we should not interpret the statute in a manner that treated the federal government differently from the state government absent some indication of

legislative intent. Id.; see also People v. Crow, 864 P.2d 80, 84-85 (Cal. 1993) (holding that defrauded state government agency was a "person" entitled to seek restitution from wrongdoer); City of Los Angeles v. City of San Fernando, 537 P.2d 1250, 1306-07 (Cal. 1975) (holding that statute prohibiting possession of city property "by any person, firm or corporation " could preclude possession by a government agency); Flournoy v. State, 370 P.2d 331, 332 (Cal. 1962) (applying to a state government a wrongful death statute attaching liability to any `person' responsible for another's death); Gomes v. County of Mendocino, 44 Cal. Rptr. 2d 93, 96 (Cal. Ct. App. 1995) (statute covering "a person, firm, corporation, partnership or association" included federal government). Thus, although the case at bar presents an issue of first impression, ample precedent supports the position that the term "person " may include a governmental agency.

B. Statutory Language

[3] The Act states explicitly that "It is the intent of the Legislature in enacting this article to . . . safeguard the public against deceit . . . This article shall be construed liberally in order to achieve [this] purpose[ ]. " § 17511(b). We conclude that treating the FTC as a person would be consistent with the Act's purpose by furthering the goal of consumer redress.

Indeed, if the FTC were not able to enforce liability, it is unclear whether the bond would serve its intended purpose of consumer protection: Neither the State of California nor any individual consumer has sought enforcement. As such, an interpretation of "person" precluding FTC enforcement would provide Frontier with a windfall and undermine the purpose of the Act. Moreover, evidence in the record indicates that the Attorney General of California believes that

FTC enforcement would serve the Act's purpose; his interpretation is entitled to deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984) (holding that considerable weight should be accorded executive department's construction of statutory scheme it is entrusted to administer).

[4] Frontier does not dispute that the Act was intended to protect consumers. Rather, it argues that the Act was intended to benefit only the citizens of California and, consequently, may not be enforced by the federal government to provide redress for out-of-state residents. Frontier's position is not persuasive. Although the bond must be written "in favor of the State of California," see § 17511.12(a), this drafting requirement does not restrict who may enforce the bond. Rather, the bond exists "for the benefit of any person suffering pecuniary loss in a transaction commenced during the period of bond coverage with a telephonic seller who violated" the Act. § 17511.12(a) (emphasis added). Accordingly, we reject Frontier's ejusdem generis argument, because it is settled law that the doctrine of ejusdem generis should not be applied to defeat legislative intent. See, e.g., Leslie Salt Co. v. United States, 896 F.2d 354, 359 (9th Cir. 1990); Walker v. Meehan, 240 Cal. Rptr. 171, 175 (Cal. Ct. App. 1987).

Frontier insists that section 17511.2(d) explicitly limits the parties who may enforce liability on the bond. It is true that section 17511.2(d) provides that " `Person' includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity." Nonetheless, Frontier's argument is without merit because "[i]n terms of statutory-construction, use of the word `includes' does not connote limitation.

In definitive provisions of statutes and other writings, `include' is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration." In re Yochum, 89 F.3d 661, 668 (9th Cir. 1996) (citations and internal quotations omitted). As such, the Act merely provides examples of who may enforce the bond.

C. Legislative history

[5] Legislative history also supports the position that the FTC may enforce liability on the bond. Prior to 1993, telephonic sellers were required to post a $50,000 bond, which could be enforced only by the Attorney General, a district attorney, or a city attorney. In 1993, the Act was amended to increase the bond requirement to $100,000 and to permit enforcement actions by "any other person who obtained a judgment for restitution against the seller." The Legislature indicated that the change was intended to "expand the situations under which, the parties to whom and the procedures whereby, the bond may be reached for payment of consumer losses or for violations of the law's requirements. " Senate Rules Committee Report for California Assembly Bill No. 1421 (1993). We conclude that permitting the FTC to enforce the bond will expand opportunities for redress, as well as the group of people entitled to benefit from the bond.

II. Allowing the FTC to enforce the bond would not violate the Tenth Amendment.

[6] Frontier argues that allowing the federal government to use legislation enacted by the State of California to accomplish its goals violates the Tenth Amendment. Frontier cites

two cases; neither supports its argument, as both cases involve whether treating a governmental entity as a person would diminish its own sovereignty. See Community Memorial Hosp. of San Buena Ventura v. County of Ventura, 56 Cal. Rptr. 2d 732, 739 (Cal. Ct. App. 1996) (allowing county to be sued would infringe on county's sovereignty); Churchill v. Parnell, 216 Cal. Rptr. 876, 878-79 (Cal. Ct. App. 1985) (including state in definition of person would infringe on state's sovereignty by restricting its ability to protect fish and wildlife). Here, allowing FTC enforcement would not compromise the State of California's sovereignty in any way. In fact, FTC enforcement would assist the State of California in furthering the policy interests the Act was designed to serve. Moreover, although the Tenth Amendment precludes the federal government from commandeering a state by forcing it to enact or enforce a federal regulatory program, New York v. United States, 505 U.S. 144, 161 (1992), no such conduct occurred here.

III. The FTC has the necessary statutory authority to seek enforcement of the judgment.

[7] Finally, Frontier suggests that the FTC can take action to collect a judgment only if the authority is specifically provided by statute. This argument is without merit. The Ninth Circuit has held that "the authority granted by[the Act] is not limited to the power to issue an injunction; rather, it includes the authority to grant any ancillary relief necessary to accomplish complete justice," including the power to "order restitution." FTC v. Patron I, Corp., 33 F.3d 1088, 1102 (9th Cir. 1994) (citations and internal quotations omitted). We see no reason why the FTC should not be permitted to grant ancillary relief by enforcing liability on the bond.

CONCLUSION

For the reasons stated above, we find that the FTC is a "person' within the meaning of the Act.

REVERSED AND REMANDED.

Dated: 12/6/96

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

MTK MARKETING, INC., d/b/a District Supply Center and Central Supply Center; NATIONWIDE TRANSPORT, INC., d/b/a District Supply Center, COPY RESOURCE CENTER, INC., d/b/a District Supply Center and Central Supply Center; INTEL MARKETING OF CALIFORNIA, INC., d/b/a District Supply Center; TELCO MARKETING, INC., d/b/a Central Supply Center; PARAGON SHIPPING, INC., d/b/a National Supply Center; ACACIA PROPERTIES, INC., d/b/a National Supply Center; SAM JUNE; ERICK GRAZIANO, a/k/a Eric Knight; DONALD N. RYAN; DONNA GREEN; COLLEEN MCCULLOUGH; IEANINE DORA; JAMES REM, d/b/a Central Supply Center and JR Associates,
Appellees.

PROCEEDINGS: ENFORCE LIABILITY OF BOND

IN CHAMBERS:

(1) The Court has read and considered plaintiff Federal Trade Commission's ("FTC") Motion to Enforce Liability of Bond, Defendant Frontier Pacific Insurance Company's ("Frontier") Opposition, Plaintiff's Reply, and all papers submitted by the parties. In addition, the Court has conducted independent research.

(2) Ruling: Plaintiff's motion is denied without prejudice to a proper party bringing a separate action in a court with proper jurisdiction.

(3) Analysis: Cal. Business and Prof.. Code § 17511.12 requires telephonic sellers to maintain a $100,000 bond issued by a surety company admitted to do business in California. Defendant Frontier is a surety, Pursuant to § 17511.12 it issued a bond to Defendant Erick Graziano for his telephonic sales business. The FTC has moved to enforce liability on that bond.

The FTC is not a proper party to enforce the bond: Cal. Bus. & Prof. Code § 17511.12 provides that "the Attorney General, district attorney, city attorney, or any other person who obtained a judgment *for* restitution against the seller, may bring a motion to enforce the bond. The FTC is neither the Attorney General, district attorney, or city attorney. Thus, if the FTC is a proper party, it must fall within the definition of 'any other person who obtained a judgment."

§ 17511.2 provides; "`Person' includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity." The FTC does not fall within the scope of this definition. Thus, the FTC is not a proper party to this motion.

Accordingly, Plaintiff's motion is denied without prejudice to a proper party bringing a separate action in a court with proper jurisdiction.

15 USC Sec. 53 01/06/97

-EXPCITE-
TITLE 15 - COMMERCE AND TRADE
CHAPTER 2 - FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND
PREVENTION OF UNFAIR METHODS OF COMPETITION
SUBCHAPTER I - FEDERAL TRADE COMMISSION

-HEAD-
Sec. 53. False advertisements; injunctions and restraining orders

-STATUTE-
(a) Power of Commission; jurisdiction of courts
Whenever the Commission has reason to believe -
(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines

that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe -

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public -

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts

business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 USC Sec. 6101 01/06/97

TITLE 15 - COMMERCE AND TRADE

CHAPTER 87 - TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION

Sec. 6101. Findings

-STATUTE-

The Congress makes the following findings:
(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose $40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

-SOURCE-

(Pub. L. 103-297, Sec. 2, Aug. 16, 1994, 108 Stat. 1545.)

-MISC1-

SHORT TITLE

Section 1 of Pub. L. 103-297 provided that: "This Act (enacting this chapter and section 9b of Title 7, Agriculture, and amending section 52 of this title) may be cited as the 'Telemarketing and Consumer Fraud and Abuse Prevention Act'."

Sec. 6102. Telemarketing rules

-STATUTE-

(a) In general

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which may include acts or practices
of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices -

(A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,

(B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers, and

(C) a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.

In prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.

(b) Rulemaking

The Commission shall prescribe the rules under subsection (a) of this section within 365 days after August 16, 1994. Such rules shall be prescribed in accordance with section 553 of title 5.

(c) Enforcement

Any violation of any rule prescribed under subsection (a) of this section shall be treated as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.

(d) Securities and Exchange Commission rules

(1) Promulgation

(A) In general

Except as provided in subparagraph (B), not later than 6 months after the effective date of rules promulgated by the Federal Trade Commission under subsection (a) of this section, the Securities and Exchange Commission shall promulgate, or require any national securities exchange or registered securities association to promulgate, rules substantially similar to such rules to prohibit deceptive and other abusive telemarketing acts or practices by persons described in paragraph (2).

(B) Exception

The Securities and Exchange Commission is not required to promulgate a rule under subparagraph (A) if it determines that

(i) Federal securities laws or rules adopted by the Securities and Exchange Commission thereunder provide protection from deceptive and other abusive telemarketing by

persons described in paragraph (2) substantially similar to that provided by rules promulgated by the Federal Trade Commission under subsection (a) of this section; or

(ii) such a rule promulgated by the Securities and Exchange Commission is not necessary or appropriate in the public interest, or for the protection of investors, or would be inconsistent with the maintenance of fair and orderly markets.

If the Securities and Exchange Commission determines that an exception described in clause (i) or (ii) applies, the Securities and Exchange Commission shall publish in the Federal Register its determination with the reasons for it.

(2) Application

(A) In general

The rules promulgated by the Securities and Exchange Commission under paragraph (1)(A) shall apply to a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company, or any individual associated with a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company. The rules promulgated by the Federal Trade Commission under subsection

(a) of this section shall not apply to persons described in the preceding sentence.

(B) Definitions

For purposes of subparagraph (A) -

(i) the terms "broker", "dealer", "transfer agent", "municipal securities dealer", "municipal securities broker", "government securities broker", and "government securities dealer" have the meanings given such terms by paragraphs (4), (5), (25), (30), (31), (43), and (44) of section 78c(a) of this title;
(ii) the term "investment adviser" has the meaning given such term by section 80b-2(a)(11) of this title; and

(iii) the term "investment company" has the meaning given such term by section 80a-3(a) of this title.

(e) Commodity Futures Trading Commission rules

(1) Application

The rules promulgated by the Federal Trade Commission under subsection (a) of this section shall not apply to persons described in section 9b(1) of title 7.

(2) Omitted

-SOURCE-

(Pub. L. 103-297, Sec. 3, Aug. 16, 1994, 108 Stat. 1545.)

-COD-

CODIFICATION

Section is comprised of section 3 of Pub. L. 103-297. Subsec. (e)(2) of section 3 of Pub. L. 103-297 enacted section 9b of Title 7, Agriculture.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6103, 6104, 6105, 6107, 6108 of this title; title 7 section 9b.

15 USC Sec. 6103 01/06/97

Sec. 6103. Actions by States

-STATUTE-

(a) In general

Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem

appropriate.

(b) Notice

The State shall serve prior written notice of any civil action under subsection (a) or (f)(2) of this section upon the Commission and provide the Commission with a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State shall serve such notice immediately upon instituting such action. Upon receiving a notice respecting a civil action, the Commission shall have the right (1) to intervene in such action, (2) upon so intervening, to be heard on all matters arising therein, and (3) to file petitions for appeal.

(c) Construction

For purposes of bringing any civil action under subsection (a) of this section, nothing in this chapter shall prevent an attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(d) Actions by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) or (f)(2) of this section against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(e) Venue; service of process

Any civil action brought under subsection (a) of this section in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

(f) Actions by other State officials

(1) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

(2) In addition to actions brought by an attorney general of a State under subsection (a) of this section, such an action may be brought by officers of such State who are authorized by the State to bring actions in such State on behalf of its residents.

-SOURCE-

(Pub. L. 103-297, Sec. 4, Aug. 16, 1994, 108 Stat. 1548.)

-REFTEXT-

REFERENCES IN TEXT

This chapter, referred to in subsec. (c), was in the original "this Act", meaning Pub. L. 103-297, Aug. 16, 1994, 108 Stat. 1545, which is classified generally to this chapter. For complete

classification of this Act to the Code, see Short Title note set out under section 6101 of this title and Tables.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 6105 of this title.

15 USC Sec. 6104 01/06/97
Sec. 6104. Actions by private persons

-STATUTE-

(a) In general

Any person adversely affected by any pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, or an authorized person acting on such person's behalf, may, within 3 years after discovery of the violation, bring a civil action in an appropriate district court of the United States against a person who has engaged or is engaging in such pattern or practice of telemarketing if the amount in controversy exceeds the sum or value of $50,000 in actual damages for each person adversely affected by such telemarketing. Such an action may be brought to enjoin such telemarketing, to enforce compliance with any rule of the Commission under section 6102 of this title, to obtain damages, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The plaintiff shall serve prior written notice of the action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the person shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(c) Action by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no person may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(d) Cost and fees

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

(e) Construction

Nothing in this section shall restrict any right which any person may have under any statute or common law.

(f) Venue; service of process

Any civil action brought under subsection (a) of this section in

a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

-SOURCE-

(Pub. L. 103-297, Sec. 5, Aug. 16, 1994, 108 Stat. 1549.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 6105 of this title.

15 USC Sec. 6105 01/06/97

Sec. 6105. Administration and applicability of chapter

-STATUTE-

(a) In general

Except as otherwise provided in sections 6102(d), 6102(e), 6103, and 6104 of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this chapter.

(b) Actions by Commission

The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.

(c) Effect on other laws

Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

-SOURCE-

(Pub. L. 103-297, Sec. 6, Aug. 16, 1994, 108 Stat. 1549.)

-REFTEXT-

REFERENCES IN TEXT

The Federal Trade Commission Act, referred to in subsecs. (a) and(b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (Sec. 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables.

15 USC Sec. 6106 01/06/97

Sec. 6106. Definitions

-STATUTE-

For purposes of this chapter:

(1) The term "attorney general" means the chief legal officer of a State.

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or

illustrations, and

(D) has been issued not less frequently than once a year, where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

-SOURCE-

(Pub. L. 103-297, Sec. 7, Aug. 16, 1994, 108 Stat. 1550.)

15 USC Sec. 6107 01/06/97

Sec. 6107. Enforcement of orders

-STATUTE-

(a) General authority
Subject to subsections (b) and (c) of this section, the Federal Trade Commission may bring a criminal contempt action for violations of orders of the Commission obtained in cases brought under section 53(b) of this title.

(b) Appointment

An action authorized by subsection (a) of this section may be brought by the Federal Trade Commission only after, and pursuant to, the appointment by the Attorney General of an attorney

employed by the Commission, as a special assistant United States Attorney.

(c) Request for appointment

(1) Appointment upon request or motion
A special assistant United States Attorney may be appointed under subsection (b) of this section upon the request of the Federal Trade Commission or the court which has entered the order for which contempt is sought or upon the Attorney General's own motion.

(2) Timing

The Attorney General shall act upon any request made under paragraph (1) within 45 days of the receipt of the request.

(d) Termination of authority

The authority of the Federal Trade Commission to bring a criminal contempt action under subsection (a) of this section expires 2 years after the date of the first promulgation of rules under section 6102 of this title. The expiration of such authority shall have no effect on an action brought before the expiration date.

-SOURCE-

(Pub. L. 103-297, Sec. 9, Aug. 16, 1994, 108 Stat. 1550.)

Sec. 6108. Review

-STATUTE-

Upon the expiration of 5 years following the date of the first promulgation of rules under section 6102 of this title, the Commission shall review the implementation of this chapter and its effect on deceptive telemarketing acts or practices and report the results of the review to the Congress.

-SOURCE-

(Pub. L. 103-297, Sec. 10, Aug. 16, 1994, 108 Stat. 1551.)

U.S. Constitution: Tenth Amendment

Tenth Amendment - Reserved Powers

Amendment Text |

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

BUSINESS AND PROFESSIONS CODE
SECTION 17511-17511.12

17511. (a) The Legislature finds and declares that the widespread use of telephone solicitors to initiate sales of goods, real

property, and investment opportunities has created numerous problems for purchasers and investors which are inimical to good business practices. Telephonic sales have a significant impact upon the economy and well-being of this state and its local communities.

However, purchasers have suffered substantial losses because of (1) misrepresentations, (2) lack of full and complete information regarding both the telephonic seller and the goods and investments the telephonic seller is offering, and (3) failure of delivery. The provisions of this article relating to telephonic sellers are necessary for the public welfare.

(b) It is the intent of the Legislature in enacting this article to (1) provide each prospective telephonic sales purchaser with information necessary to make an intelligent decision regarding the offer made, (2) safeguard the public against deceit and financial hardship, (3) insure, foster, and encourage competition and fair dealings among telephonic sellers by requiring adequate disclosure, and (4) prohibit representations that tend to mislead. This article shall be construed liberally in order to achieve these purposes.

17511.1. As used in this article, "telephonic seller" or "seller" means a person who, on his or her own behalf or through salespersons or through the use of an automatic dialing-announcing device, as defined in Section 2871 of the Public Utilities Code, causes a telephone solicitation or attempted telephone solicitation to occur which meets the criteria specified in subdivision (a), (b), (c), or (d) and who is not exempted by subdivision (e), as follows:

(a) A telephone solicitation or attempted telephone solicitation wherein the telephonic seller initiates telephonic contact with a prospective purchaser and represents or implies one or more of

the following:

(1) That a prospective purchaser who buys one or more items will also receive additional or other items, whether or not of the same type as purchased, without further cost. For purposes of this subdivision, "further cost" does not include actual postage or common carrier delivery charges, if any.

(2) That a prospective purchaser will receive a prize or gift, if the person also encourages the prospective purchaser to do either of the following:

(A) Purchase or rent any goods or services.

(B) Pay any money, including, but not limited to, a delivery or handling charge.

(3) That a prospective purchaser is able to obtain any item or service at a price which the seller states or implies is below the regular price of the item or service offered. This paragraph shall not apply to retailers who, within the previous 12 months, have sold a majority of their goods or services through in-person sales at retail stores.

(4) That a prospective purchaser who buys office equipment or supplies will, because of some unusual event or imminent price increase, be able to buy these items at prices which are below those that are usually charged or will be charged for the items.

(5) That the seller is a person other than the person he or she is.

(6) That the items for sale are manufactured or supplied by a person other than the actual manufacturer or supplier.

(7) That the seller is offering to sell the prospective purchaser any gold, silver, or other metals, including coins, diamonds, rubies, sapphires, or other stones, coal or other minerals, or any interest in oil, gas, or mineral fields, wells, or exploration sites, or any other investment opportunity of any type whatsoever.

(8) That the seller is offering to make a loan, or to arrange or assist in arranging a loan or to assist in providing information

which may lead to the obtaining of a loan, unless no payment of any kind is made until the loan proceeds are disbursed to the borrower.

(9) That a prospective purchaser will receive a credit card, as defined in subdivision (a) of Section 1747.02 of the Civil Code, if the purchaser pays an up front or preapplication fee for the credit card to the telephonic seller.

(b) A solicitation or attempted solicitation which is made by telephone in response to inquiries generated by unrequested notifications sent by the seller to persons who have not previously purchased goods or services from the seller or who have not previously requested credit from the seller, to a prospective purchaser wherein the seller represents or implies to the recipient of the notification that any of the following applies to the recipient:

(1) That the recipient has in any manner been specially selected to receive the notification or the offer contained in the notification.

(2) That the recipient will receive a prize or gift if the recipient calls the seller.

(3) That if the recipient buys one or more items from the seller, the recipient will also receive additional or other items, whether or not of the same type as purchased, without further cost or at a cost which the seller states or implies is less than the regular price of such items.

However, this subdivision does not apply to the solicitation of sales by a catalog seller who periodically issues and delivers catalogs to potential purchasers by mail or by other means. This exception only applies if the catalog includes a written description or illustration and the sales price of each item of merchandise offered for sale, includes at least 24 full pages of written material or illustrations, is distributed in more than one state, and has an annual circulation of not less than 250,000 customers.

(c) A solicitation or attempted solicitation which is made by

telephone in response to inquiries generated by advertisements on behalf of the telephonic seller wherein it is represented or implied that the seller is offering to sell to the prospective purchaser any gold, silver, or other metals, including coins, diamonds, rubies, sapphires, or other stones, coal or other minerals, or any interest in oil, gas, or mineral fields, wells, or exploration sites, or any other investment opportunity of any type whatsoever.

(d) A solicitation or attempted solicitation which is made by telephone in response to inquiries generated by advertisements on behalf of the telephonic seller wherein it is represented or implied that the seller is offering to make a loan or to arrange or assist in arranging a loan or to assist in providing information which may lead to the obtaining of a loan, unless no payment of any kind is made until the loan proceeds are disbursed to the borrower.

(e) For purposes of this article, "telephonic seller" or "seller" does not include any of the following:

(1) A person offering or selling a security qualified under Section 25110, 25120, or 25130 of the Corporations Code or exempt from qualification under Chapter 1 (commencing with Section 25100) of Part 2 of Division 1 of Title 4 of the Corporations Code. The fact that a notice claiming an exemption under the Corporate Securities Law of 1968 is filed with the Department of Corporations does not create an exemption under this paragraph.

(2) A person licensed pursuant to Part 1 (commencing with Section 10000) of Division 4, when the solicited transaction is governed by that law.

(3) A person licensed pursuant to Chapter 9 (commencing with Section 7000) of Division 3, when the solicited transaction is governed by that law.

(4) A person licensed or certificated pursuant to Part 2 (commencing with Section 680) of Division 1 of the Insurance Code, including a person licensed pursuant to Chapter 5 (commencing with Section 1621) thereof, when the solicited transaction is governed by that law.

(5) A person offering or selling a franchise registered pursuant to Section 31110 of the Corporations Code or exempt from registration under Chapter 1 (commencing with Section 31100) of Part 2 of Division 5 of Title 4 of the Corporations Code. The fact that a notice claiming an exemption under the Franchise Investment Law is filed with the Department of Corporations does not create an exemption under this paragraph.

(6) A person soliciting the sale of a seller assisted marketing plan, as defined in Title 2.7 (commencing with Section 1812.200) of Part 4 of Division 3 of the Civil Code, who has filed with the Attorney General the documents required by Section 1812.203 of the Civil Code.

(7) A person primarily soliciting the sale of a newspaper of general circulation, as defined in Article 1 (commencing with Section 6000) of Chapter 1 of Division 7 of Title 1 of the Government Code, a magazine, or membership in a book or record club whose program operates in conformity with the requirements of Section 1584.5 of the Civil Code.

(8) A person soliciting business from prospective purchasers who have previously purchased from the business enterprise for which the person is calling.

(9) A person soliciting without the intent to complete and who does not complete the sales presentation during the telephone solicitation but completes the sales presentation at a later face-to-face meeting between the solicitor and the prospective purchaser. However, if a seller, directly following a telephone solicitation, causes an individual whose primary purpose it is to go to the prospective purchaser to collect the payment or deliver any item purchased, this exemption does not apply.

(10) Any supervised financial institution or parent, subsidiary, or subsidiary of parent thereof. As used in this paragraph, "supervised financial institution" means any commercial bank, trust company, savings and loan association, credit union, industrial loan company, personal property broker, consumer finance

lender, commercial finance lender, or insurer, provided that the institution is subject to supervision by an official or agency of this state or of the United States.

(11) A person soliciting the sale of a preneed funeral arrangement regulated by Article 9 (commencing with Section 7735) of Chapter 12 of Division 3.

(12) A person licensed pursuant to Chapter 19 (commencing with Section 9600) of Division 3 when acting pursuant to that licensure.

(13) A person soliciting the sale of services provided by a cable television system licensed or franchised pursuant to Section 53066 of the Government Code or any other authority.

(14) A person or an affiliate of a person whose business is regulated by the Public Utilities Commission.

(15) A person soliciting the sale of a commodity pursuant to Part 2 (commencing with Section 58601) of Division 21 of the Food and Agricultural Code, if the solicitation neither intends to, nor actually results in, a sale which costs the purchaser in excess of one hundred dollars ($100).

(16) An issuer or subsidiary of an issuer that has a security listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc., if the exchange or interdealer quotation system has been certified by rule or order of the Commissioner of Corporations under subdivision (o) of Section 25100 of the Corporations Code. A subsidiary of an issuer that qualifies for exemption under this paragraph is not itself exempt unless not less than 60 percent of the voting power of its shares is owned by the qualifying issuer or issuers.

(17) A person soliciting exclusively the sale of telephone answering services to be provided by that person or that person's employer.

(18) A person soliciting a transaction regulated by the Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the Commodity Futures Trading Commission under the Commodity Exchange Act, (7 U.S.C. Sec. 1 et seq.) and the registration or license has not expired or been suspended or revoked.

(19) A person who sells coins or bullion at a price which is not more than 25 percent more than the price at which the seller is concurrently buying the same coins or bullion, if: (A) the seller has had a retail location in California from which he or she has been selling coins or bullion to the public in person for at least three years; (B) the telephonic solicitations are not the person's primary business and sales made telephonically make up less than 20 percent of the person's total retail sales; and (C) the person claiming an exemption pursuant to this subdivision complies with Section 17511.3, as applicable, and subdivision (p) of Section 17511.4.

(20) A person licensed pursuant to Chapter 14 (commencing with Section 1800) of Division 1 of the Financial Code to receive money for transmittal to foreign countries if the license has not expired or been suspended or revoked.

(21) A person licensed as a residential mortgage lender or servicer pursuant to Division 20 (commencing with Section 50000) of the Financial Code, when acting under the authority of that license.

(f) In any civil proceeding alleging a violation of this article, the burden of proving an exemption or an exception from a definition is upon the person claiming it, and in any criminal proceeding alleging a violation of this article, the burden of producing evidence to support a defense based upon an exemption or an exception from a definition is upon the person claiming it.

(g) Compliance with this article does not satisfy nor substitute for any requirements for license, registration, or regulation

mandated by other laws.

17511.2. As used in this article, the following terms have the following meanings:

(a) "Department" means the Department of Justice.

(b) "Item" means any goods and services, and includes coupon books which are to be used with businesses other than the seller's business.

(c) "Owner" means a person who owns or controls 10 percent or more of the equity of, or otherwise has claim to 10 percent or more of the net income of, a telephonic seller.

(d) "Person" includes an individual, firm, association, corporation, partnership, joint venture, or any other business entity.

(e) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole proprietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person.

(f) "Purchaser" or "prospective purchaser" means a person who is solicited to become or does become obligated to a telephonic seller.

(g) "Salesperson" means any individual employed, appointed or authorized by a telephonic seller, whether referred to by the telephonic seller as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of the telephonic seller.

17511.3. (a) Not less than 10 days prior to doing business in this state, a telephonic seller shall register with the department by

filing with the Consumer Law Section of the department the information required by Section 17511.4 and a filing fee of fifty dollars ($50). A seller shall be deemed to do business in this state if the seller solicits prospective purchasers from locations in this state or solicits prospective purchasers who are located in this state.

A person claiming an exemption pursuant to paragraph (19) of subdivision (d) of Section 17511.1 shall file with the Consumer Law Section of the department, in lieu of the information required by subdivisions (a) to (o), inclusive, of Section 17511. 4, the information required by subdivision (p) of Section 17511.4 and a filing fee of fifty dollars ($50).

The information required by Section 17511.4 shall be submitted on a form provided by the Attorney General and shall be verified by a declaration signed by each principal of the telephonic seller under penalty of perjury. The declaration shall specify the date and location of signing. Information submitted pursuant to subdivision
(j) or (k) of Section 17511.4 shall be clearly identified and appended to the filing. The information submitted pursuant to Section 17511.4 shall become part of the investigatory records and intelligence information compiled by the department for law enforcement purposes.

(b) Registration of a telephonic seller shall be valid for one year from the effective date thereof and may be annually renewed by making the filing required by Section 17511.4 and paying a filing fee of fifty dollars ($50).

(c) Whenever, prior to expiration of a seller's annual registration, there is a material change in the information required by Section 17511.4, the seller shall, within 10 days, file an addendum updating the information with the Consumer Law Section of the department. However, changes in salespersons soliciting on behalf of a seller shall be updated by addendums filed, if necessary, in quarterly intervals computed from the effective date

of registration. The addendum shall provide the required information for all salespersons who are currently soliciting or have solicited on behalf of the seller at any time during the period between the filing of the registration, or the last addendum, and the current addendum, and shall include salespersons no longer soliciting for the seller as of the date of the filing of the current addendum.

(d) Upon receipt of a filing and filing fee pursuant to subdivision (a) or (b), the department shall send the telephonic seller a written confirmation of receipt of the filing. If the seller has more than one business location, the written confirmation shall be sent to the principal business location identified in the seller's filing in sufficient number so that the seller has receipt of filing, within 10 days of receipt thereof, in a conspicuous place at each of the seller's business locations and shall have available for inspection by any governmental agency at each location a copy of the entire registration statement which has been filed with the department. Until confirmation of receipt of filing is received and posted, the seller shall post in a conspicuous place at each of the seller's business locations within this state a copy of the first page of the registration form sent to the department. The seller shall also post in close proximity to either the confirmation of receipt of filing, or until the confirmation is received, the first page of the submitted registration form, the name of the individual or individuals in charge of each location from which the seller does business in this state, as defined in subdivision (a).

17511.4. Each filing pursuant to Section 17511.3 shall contain the following information:

(a) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different

from the name of the seller, and the name of any parent or affiliated organization (1) that will engage in business transactions with purchasers relating to sales solicited by the seller or (2) that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller.

(b) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto, or, if a partnership, a copy of the partnership agreement, or if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to subdivision (a).

(c) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business. If the principal business location of the seller is not in this state, then the seller shall also designate which of its locations within this state is its main location in the state.

(d) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located.

(e) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities.

(f) The complete address of the principal residence, the date of birth, and the driver's license number and state of issuance of each of the persons whose names are disclosed pursuant to subdivision (e).

(g) The name and principal residence address of each person the telephonic seller leaves in charge at each location from which

the seller does business in this state, as defined in subdivision (a) of Section 17511.3, and the business location which each of these persons is or will be in charge of.

(h) A statement, meeting the requirements of this subdivision, as to both the seller, whether a corporation, partnership, firm, association, joint venture, or any other type of business entity (and whether identified pursuant to subdivision (e) or (g) or not), and as to any person identified pursuant to subdivision (e) or (g) who:

(1) Has been convicted of a felony or misdemeanor involving an alleged violation of this article, or fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property. For purposes of this paragraph, a plea of nolo contendere is a conviction.

(2) Has had entered against him or her a final judgment or order in a civil or administrative action, including a stipulated judgment or order, if the complaint or petition in the civil or administrative action alleged acts constituting a violation of this article, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property, the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property, or the use of unfair, unlawful, or deceptive business practices.

(3) Is subject to any currently effective injunction or restrictive court order relating to business activity as the result of an action brought by a federal, state, or local public agency or unit thereof, including, but not limited to, an action affecting any vocational license.

(4) Has at any time during the previous seven tax years filed in bankruptcy, been adjudged a bankrupt, been reorganized due to insolvency, or been a principal, director, officer, trustee, general or limited partner, or had management responsibilities of any other corporation, partnership, joint venture, or business entity, that has so filed or was so adjudicated or reorganized, during or within one year after the period that the person held that position.

For purposes of paragraphs (1), (2), and (3), the statement required by this subdivision shall identify the seller or person, the court or administrative agency rendering the conviction, judgment, or order, the docket number of the matter, the date of the conviction, judgment, or order, and the name of the governmental agency, if any, that brought the action resulting in the conviction, judgment, or order. For purposes of paragraph (4), the statement required by this subdivision shall include the name and location of the seller or person filing in bankruptcy, adjudged a bankrupt, or reorganized due to insolvency, and shall include the date thereof, the court which exercised jurisdiction, and the docket number of the matter.

(i) A list of the names, principal residence addresses, the date of birth, and the driver's license number and state of issuance thereof, of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while so soliciting. No salesperson shall use the same name as used by any other salesperson soliciting for the telephonic seller and no telephonic seller shall permit a salesperson to use the same name as used by any other salesperson soliciting for the telephonic seller.

(j) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers, or if no sales script is required to be used, a statement to that effect.

(k) A copy of all sales information and literature (including, but not limited to, scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium-award information) provided by the telephonic seller to salespersons or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser.

(l) If the telephonic seller represents or implies, or directs salespersons to represent or imply, to purchasers that the purchaser will receive certain specific items (including a certificate of

any type which the purchaser must redeem to obtain the item described in the certificate) or one or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the filing shall include the following:

(1) A list of the items offered.

(2) The value or worth of each item described to prospective purchasers and the basis for the valuation.

(3) The price paid by the telephonic seller to its supplier for each of these items and the name, address, and telephone number of each item's supplier.

(4) If the purchaser is to receive fewer than all of the items described by the seller, the filing shall include the following:

(A) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive.

(B) The odds a single prospective purchaser has of receiving each described item.

(C) The name and address of each recipient who has, during the preceding 12 months (or if the seller has not been in business that long, during the period the telephonic seller has been in business) received the item having the greatest value and the item with the smallest odds of being received.

(5) All rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item.

(m) If the telephonic seller is offering to sell any metal, stone, or mineral, the filing shall include the following:

(1) The name, address, and telephone number of each of the seller' s suppliers and a description of each metal, stone, or mineral provided by the supplier.

(2) If possession of any metal, stone, or mineral is to be retained by the seller or will not be transferred to the purchaser until the purchaser has paid in full, the filing shall include the following:

(A) The address of each location where the metal, stone, or

mineral will be kept.

(B) If not kept on premises owned by the seller or at an address or addresses set forth in compliance with subdivision (c), the name of the owner of the business at which the metal, stone, or mineral will be kept.

(C) A copy of any contract or other document which evidences the seller's right to store the metal, stone, or mineral at the address or addresses designated pursuant to subparagraph (A).

(3) If the seller is not selling the metal, stone, or mineral from its own inventory, but instead purchases the metal, stone, or mineral to fill orders taken from purchasers, the filing shall include copies of all contracts or other documents evidencing the seller's ability to call upon suppliers to fill the seller's orders.

(4) If the seller represents to purchasers that the seller has insurance or a surety bond of any type relating to a purchaser's purchase of any metal, stone, or mineral from the seller, the filing shall include a complete copy of all these insurance policies and bonds.

(5) If the seller makes any representation as to the earning or profit potential of purchases of any metal, stone, or mineral, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, substantiating data shall be based on the experiences of at least 50 percent of the persons who have purchased the particular metal, stone, or mineral from the seller or related entity during the preceding six months (or if the seller or related entity has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular metal, stone, or mineral being offered.

(B) The number of purchasers thereof from the seller or related

entity known to the seller or related entity to have made at least the same earnings or profit as those represented.

(C) The percentage that the number disclosed pursuant to subparagraph (B) represents of the total number of purchasers from the seller or related entity of the particular metal, stone, or mineral.

(n) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the filing shall include disclosure of the following:

(1) The seller's ownership interest, if any, in each field, well, or site being offered for sale.

(2) The total number of interests to be sold in each field, well, or site being offered for sale.

(3) If, in selling an interest in any particular field, well, or site, reference is made to an investigation of these fields, wells, or sites by the seller or anyone else, the filing shall include the following:

(A) The name, business address, telephone number, and professional credentials of the person or persons who made the investigation.

(B) A copy of the report and other documents relating to the investigation prepared by the person or persons.

(4) If the seller makes any representation as to the earning or profit potential of purchases of any interest in these fields, wells, or sites, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, the substantiating data shall be based on the experiences of at least 50 percent of the purchasers of the particular interests from the seller or the related entity during the preceding six months (or if the seller has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular interests in the fields, wells, or sites being offered.

(B) The number of purchasers of the particular interests from the seller or related entity known to the seller to have made, at least the same earnings as those represented.

(C) The percentage the number disclosed pursuant to subparagraph (B) represents of the total number of purchasers of the particular interests from the seller or related entity.

(o) The name and address of the telephonic seller's agent in this state, other than the Attorney General, authorized to receive service of process in this state.

(p) If a person, based on paragraph (19) of subdivision (c) of Section 17511.1, claims an exemption from having to file the information required by subdivisions (a) to (o), inclusive, the person shall file, on a form provided by the Attorney General, the following information:

(1) The name or names of the person claiming the exemption, including the name under which the person is doing or intends to do business.

(2) The person's business form, and place of organization, whether corporate or otherwise; or, if operating under a fictitious business name, the location where the fictitious name has been registered.

(3) The complete street address of the person's retail locations, and telephone numbers located therein and a statement as to how long the person has been selling at retail from each location.

(4) A copy of the person's currently valid business license.

(5) A statement reflecting the dollar amount of the person's total retail sales during the 12 months preceding the filing.

(6) A statement reflecting the dollar amount of the person's sales made telephonically during the 12 months preceding the filing.

The filing shall be verified by a declaration signed under penalty

of perjury by each principal of the person claiming the exemption. The declaration shall specify the date and location of signing.

If a person filing pursuant to subdivision (p) makes any representation to a prospective purchaser as to the historical movements or changes in the price or value of any coin or bullion, the person shall maintain in its records sufficient data to substantiate each representation. This data shall be retained in the person's records for a period of at least three years after the last date on which a representation is made and shall be made available for inspection upon request by any governmental agency at each of its business locations.

(q) If the telephonic seller represents or implies, or directs salespersons to represent or imply, that the telephonic seller can, or may be able to, make a loan or arrange or assist in arranging a loan or to assist in providing information which may lead to the obtaining of a loan, the filing shall include the following:

(1) The names and addresses of all persons who, in the previous 24 months, lent money to those who responded to the seller's solicitations or lent money to the telephonic seller for the seller to lend to those who responded to the seller's representations that it could make a loan or arrange or assist in arranging a loan or could assist in providing information which could lead to the obtaining of a loan.

(2) The names and addresses of all persons who, in the previous 24 months, lent money to those who responded to the solicitations of the seller's predecessor or the seller's officers, owners, or those persons having present management responsibilities or to companies with which they were associated, that they could make a loan or arrange or assist in arranging a loan or could assist in providing information which could lead to the obtaining of a loan or lent money to the seller's predecessor or the seller's officers, owners, or those persons having present management responsibilities or to companies with which they were associated for them to lend to those who responded to these representations.

(3) The names and addresses of all persons who have informed the telephonic seller that they may be able to lend money, within the next 12 months from the date of this registration, to persons solicited by the seller or to the telephonic seller for the seller to lend to those who respond to the seller's representations that it can make a loan or arrange or assist in arranging a loan or can assist in providing information which can lead to the obtaining of a loan.

(4) Copies of all contracts between the seller and lenders or prospective lenders who may lend money: (A) to the seller to lend to individuals who, in connection with the seller's business activities, respond to the seller's representations that it can make a loan or arrange or assist in arranging a loan or can assist in providing information which can lead to the obtaining of a loan; or (B) directly to persons to whom the seller may represent that it can arrange or assist in providing information which can lead to the obtaining of a loan.

17511.5. In addition to complying with the requirements of Section 17500.3, as applicable, a telephonic seller, shall, at the time the solicitation is made and prior to consummation of a sales transaction, provide all of the following information to a prospective purchaser:

(a) If the telephonic seller represents or implies that a prospective purchaser will receive, without charge therefor, certain specific items or one item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the seller shall provide the following:

(1) The information required to be filed by subparagraphs (A) and (B) of paragraph (4) of, and paragraph (5) of, subdivision (l) of Section 17511.4. In addition, each time the telephonic seller makes reference to an item or items, the telephonic seller shall

state that no purchase is necessary, and that the purchase of goods will have no greater chance of receiving the more valuable item or items than the person who does not purchase. The seller shall state, in a manner enabling a consumer to copy the information, the method, including the telephonic seller's address, for obtaining without purchase the item or items or for a chance to obtain the item or items. The provisions of Section 17537.2 of the Business and Professions Code shall apply to all offers.

(2) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location.

(3) The total number of individuals who have actually received from the telephonic seller, during the preceding 12 months (or if the seller has not been in business that long, during the period the telephonic seller has been in business), the item having the greatest value and the item with the smallest odds of being received.

(b) If the telephonic seller is offering to sell any metal, stone, or mineral, the seller shall provide the following information:

(1) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location.

(2) When required to be filed pursuant to Section 17511.4, the information specified in subparagraphs (A) and (B) of paragraph (2) of, and paragraph (5) of, subdivision (m) of Section 17511.4.

(c) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites the seller shall provide the following information:

(1) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location.

(2) The information required to be filed by paragraphs (1), (2),

and (4) of, and subparagraph (A) of paragraph (3) of, subdivision (n) of Section 17511.4.

(d) If the telephonic seller represents that office equipment or supplies being offered are offered at prices which are below those usually charged for these items, the seller shall provide the following information:

(1) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location.

(2) The name of the manufacturer of each of the items the telephonic seller has represented for sale and in which the prospective purchaser expresses interest.

(e) If the solicitation is a "home solicitation contract or offer" within the meaning of Section 1689.5 of the Civil Code, the seller shall comply with the following:

(1) At the time the solicitation is made, the telephonic seller shall inform the buyer orally of the following:

(A) The buyer has the right to cancel the contract or offer until midnight of the third business day after the day on which the buyer receives the product or products ordered or the notice of confirmation of services ordered. This right of cancellation begins to run from the date of the buyer's receipt of the product or products ordered or, in the case of services ordered, from the buyer' s receipt of the notice of confirmation of services ordered.

(B) A written notice of cancellation will be sent with the product or products ordered or, in the case of services, the notice of cancellation shall accompany a notice of confirmation that shall be sent to the purchaser immediately following the telephonic agreement to purchase those services.

(2) The telephonic seller shall provide the buyer with a written notice of cancellation that shall accompany and be attached to any product or products sent to the purchaser in response to a telephone solicitation or, in the case of services, shall accompany

a notice of confirmation of the agreement to purchase services. The notice of cancellation shall be in duplicate, captioned "Notice of Buyer's Right of Cancellation," which shall be separate from or easily detachable from any agreement or offer to purchase which accompanies the product or products or notice of confirmation, and shall contain, in type of at least 10-point, the following cancellation statement, and no other information or statement, written in the same language used in the telephone solicitation:

"NOTICE OF BUYER'S RIGHT OF CANCELLATION"

You may cancel this transaction, without any penalty or obligation, within three business days following your receipt of this notice of cancellation and the receipt of any products, or in the case of services, within three business days following receipt of the attached notice of confirmation.

If you cancel, any payments made by you or authorized by you, pursuant to any telephonic solicitation and purchase agreement shall be returned to you within 10 days following receipt by the seller of your cancellation notice.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract, agreement, or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for the performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____ (name of seller), at _____ (address of seller's place of business) not later than midnight of the third business day after receipt of the products and this notice of cancellation.

I HEREBY CANCEL THIS TRANSACTION.

_____
DATE

_____
BUYER'S SIGNATURE

17511.6. Every telephonic seller shall file with the Attorney General, in the form prescribed by the Attorney General, an irrevocable consent appointing the Attorney General to act as the seller's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against the seller or the seller's successor, executor, or administrator, which may arise under this article, when the agent designated pursuant to subdivision (o) of Section 17511.4 has resigned and has not been replaced or if the agent so designated cannot with reasonable diligence be found at the address designated pursuant to subdivision (o) of Section 17511.4 or if no agent has been designated pursuant thereto. When service is made upon the Attorney General in conformance with this section, it shall have the same force and validity as if served personally on the seller. Service may be made by leavi ng a copy of the process in the office of the Attorney

General, but it shall not be effective unless both of the following are done:

(a) When service is effected pursuant to this section, the plaintiff shall forthwith send by first-class mail a notice of the service and a copy of the process to the defendant or respondent at the last address on file with the department.

(b) The plaintiff's affidavit of compliance with this section shall be filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

17511.7. No seller shall make or authorize the making of any references to its compliance with this article to any prospective or actual purchaser.

17511.8. No salesperson shall solicit prospective purchasers on behalf of a telephonic seller who is not currently registered with the department pursuant to this article. Any salesperson who violates this section is guilty of a misdemeanor punishable by imprisonment in the county jail for not more than six months, by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that fine and imprisonment.

17511.9. Except as provided in Section 17511.8, any person, including, but not limited to, the seller, a salesperson, agent or representative of the seller, or an independent contractor, who willfully violates any provision of this article or who directly or indirectly employs any device, scheme, or artifice to deceive in connection with the offer or sale by any telephonic seller, or who willfully, directly, or indirectly, engages in any act, practice, or

course of business which operates or would operate as a fraud or deceit upon any person in connection with a sale by any telephonic seller shall, upon conviction, be punished as follows:

(a) By a fine not exceeding ten thousand dollars ($10,000) for each unlawful transaction.

(b) By imprisonment in the state prison, or by imprisonment in the county jail for not more than one year.

(c) By both the fine and imprisonment specified in subdivisions (a) and (b).

17511.10. The provisions of this article are not exclusive. The remedies specified in this article for violation of any section of this article or for conduct proscribed by any section of this article shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

Nothing in this article shall limit any other statutory or any common law rights of the Attorney General, any district attorney or city attorney, or any other person. If any act or practice proscribed by this article is also the basis for a cause of action in common law or a violation of another statute, the purchaser may assert the common law or statutory cause of action under the procedures and with the remedies applicable thereto.

17511.12. (a) Every telephonic seller shall maintain a bond issued by a surety company admitted to do business in this state. The bond shall be in the amount of one hundred thousand dollars ($100,000) in favor of the State of California for the benefit of any person suffering pecuniary loss in a transaction commenced during the period o bond coverage with a telephonic seller who violated this chapter.

The bond shall include coverage for the payment of the portion of any judgment, including a judgment entered pursuant to Section 17203 or 17535, that provides for restitution to any person suffering pecuniary loss, notwithstanding whether the surety is joined or served in the action or proceeding. A copy of the bond shall be filed with the Consumer Law Section of the Department of Justice.

This bond shall not be required of any cable television operator franchised or licensed pursuant to Section 53066 of the Government Code.

(b) (1) At least 10 days prior to the inception of any promotion offering a premium with an actual market value or advertised value of five hundred dollars ($500) or more, the telephonic seller shall notify the Attorney General in writing of the details of the promotion, describing the premium, its current market value, the value at which it is advertised or held out to the customer, and the date the premium shall be awarded. All premiums offered shall be awarded. The telephonic seller shall maintain an additional bond for the total current market value or advertised value, whichever is greater, of the premiums held out or advertised to be available to a purchaser or recipient. A copy of the bond shall be filed with the Consumer Law Section of the Department of Justice. The bond shall be for the benefit of any person entitled to the premium who did not receive it within 30 days of the date disclosed to the Attorney General as the date on which the premium would be awarded. The amount paid to a person under a bond required by this subdivision shall not exceed the greater of the current market value or advertised or represented value of the premium offered to that person. The bond shall include coverage for the payment of any judgment, including a judgment entered pursuant to Section 17203 or 17535, that provides for payment of the value of premiums that were not timely awarded, notwith

standing whether the surety is joined or served in the action or proceeding. The bond shall also provide for payment upon motion by the Attorney General pursuant to subdivision (d) in the event the seller fails to provide the Attorney General with proof of the award of premiums as required in paragraph (2).

(2) Within 45 days after the date disclosed to the Attorney General for the award of premiums, the seller shall provide to the Attorney General proof that all premiums were awarded. The proof shall include the names, addresses, and telephone numbers of the recipients of the premiums and the date or dates on which the premiums were awarded. The bond shall be maintained until the seller files proof with the Attorney General as required by this subdivision or until payment of the amount of the bond is ordered pursuant to subdivision (d).

(c) (1) In addition to any other means for the enforcement of the surety's liability on a bond required by this section, the surety's liability on the bond may be enforced by motion, as provided in this subdivision, after a judgment has been obtained against the seller.

(2) The Attorney General, district attorney, city attorney, or any other person who obtained a judgment for restitution against the seller, as described in subdivision (a), may file a motion in the court that entered the judgment to enforce liability on the bond without first attempting to enforce the judgment against any party liable under the judgment.

(3) The notice of motion, the motion, and a copy for the judgment shall be served on the surety as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure. The notice shall set forth the amount of the claim and a brief statement indicating that the claim is covered by the bond.

Service shall also be made on the Consumer Law Section of the Department of Justice.

(4) The court shall grant the motion unless (A) the surety

establishes that the claim is not covered by the bond or (B) the court sustains an objection made by the Attorney General that the grant of the motion might impair the rights of actual or potential claimants or is not in the public interest.

(d) (1) In addition to any other means for the enforcement of the surety's liability on a bond required by subdivision (b), the surety' s liability on the bond may be enforced by motion as provided in this subdivision.

(2) The Attorney General, district attorney, city attorney, or any person who claims the premium, may file a motion in a court of competent jurisdiction in the county or judicial district from which the seller made an offer of a premium, in which the seller maintains any office or place of business, or in which an offeree of the premium resides. The motion shall set forth the nature of the seller' s offer, the greater of the current market value or advertised or represented value of the premium, the date by which the premium should have been awarded, and the fact that the premium was not awarded as represented.

(3) The notice of motion and motion shall be served on the surety as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure.

(4) The court shall grant the motion unless the surety establishes that the claim is untrue or is not covered by the bond.

(5) The Attorney General may file a motion in a court of competent jurisdiction in the county or judicial district from which the seller made an offer of a premium, or in which an offeree of a premium resides, for the payment of the entire bond if the seller fails to file proof with the Attorney General of the award of all premiums as required by paragraph (2) of subdivision (b). The notice of motion and motion shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be granted if the Attorney General establishes that the seller failed to file proof of making the timely award of all premiums. The recovery on the

bond shall be distributed pro rata to the promised recipients of the premiums to the extent their identity is actually known to the Attorney General at the time payment is made by the surety. The balance of the recovery shall be paid to any judicially established consumer protection trust fund designated by the Attorney General or as directed by the court under the cy pres doctrine.

(e) No stay of a motion filed pursuant to this section shall be granted pending the determination of conflicting claims among beneficiaries. An order enforcing liability on a bond may be enforced in the same manner as a money judgment pursuant to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure. Nothing herein affects the rights of the surety against te principal.

(f) The surety shall not be liable on the bond for payment of a judgment against a seller for any violation of this chapter unless the action or proceeding is filed within two years after the cancellation or termination of the bond, the termination of the seller's registration, or the seller's cessation of business, whichever is later.

(g) The surety shall not be liable on a motion made pursuant to subdivision (d) unless the motion is filed within two years of the date on which the seller represented the premium was to have been awarded.

(h) For the purpose of this section, "judgment" includes a final order in a proceeding for the termination of telephone service pursuant to Public Utilities Commission Tariff Rule 31.

(i) Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure shall apply to the enforcement of a bond given pursuant to this section except to the extent of any inconsistency with this section, in which event this section shall apply.